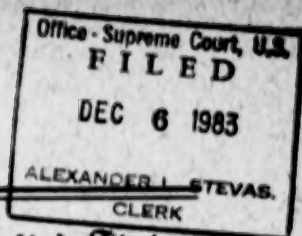


No. 83-403



In the Supreme Court of the United States

OCTOBER TERM, 1983

JOHN L. SASSCER, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT*

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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This is a tax protester case. Petitioner seeks review of his conviction for willfully failing to file income tax returns, asserting that the district court improperly instructed the jury.

1. Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted of willfully failing to file income tax returns for 1976 and 1977, in violation of 26 U.S.C. 7203. Petitioner was fined a total of \$1,000 and sentenced to concurrent one-year prison terms. The court of appeals affirmed (Pet. App. A1-A3).

2. The evidence at trial established the following facts: During the years 1976 and 1977, petitioner earned enough gross income to require him to file federal income tax returns (C.A. App. 139-140; Tr. 473-474). Petitioner filed Forms 1040 with the Internal Revenue Service (IRS)

purporting to be his federal tax returns for each year, but he failed to include thereon any information except his name, address, and family status. On each line requesting tax-related information (such as gross income, deductions, taxable income or tax due), petitioner responded that "objection is made to the question" under the 1st, 4th, 5th, 7th, 8th, 9th, 10th, 13th, 14th and 16th Amendments (C.A. App. 4-5, 42-43). Each Form contained the notation that it was "filed under protest." Attached to each Form 1040 were 30 pages of materials taken from a tax-protest kit, including dissertations on the metallic content of coins, affidavits expressing "considerable confusion as to what is a 'dollar,' " and copies of newspaper articles bearing titles like "Big Brotherism Grows" (*id.* at 6-39, 49-73).

The IRS notified petitioner shortly after receiving his 1976 and 1977 submissions that they were not acceptable as income tax returns because they did not contain the information required by law (C.A. App. 40-41). Petitioner replied that he was willing to resubmit or amend the forms if the IRS would indicate how he could do so without waiving his constitutional rights (*id.* at 74, 79). In November 1978, an IRS special agent advised petitioner that he was under investigation concerning his 1976 and 1977 tax liabilities (Tr. 231). The following January petitioner sent the IRS checks purporting to represent payment of those liabilities, but furnished no financial information or explanation as to how the amounts were calculated (C.A. App. 80). The IRS notified petitioner in August 1979 that his checks would be held as a cash bond against the tax that would ultimately be assessed against him for 1976-1977, making it clear that part or all of the bond would be returned to him upon his request (*id.* at 93-96). Petitioner subsequently requested that a portion of the payments be returned (*ibid.*).

In October 1979 petitioner submitted "amended" Forms 1040 for 1976 and 1977 (C.A. App. 97-127). These Forms, like the Forms petitioner submitted earlier, contained no financial information from which a tax liability could be determined; they differed from the earlier versions only in that the words "Object — Self Incrimination" were inserted on virtually every line (*ibid.*). The attachments were somewhat different, having been taken from a different tax-protest kit; they included a standardized "memorandum" purporting to justify a taxpayer's refusal, on Fifth Amendment grounds, to provide any tax information.

Petitioner was indicted and convicted for willful failure to file income tax returns for 1976-1977. The Fourth Circuit affirmed his conviction in an unpublished order, holding that "there was ample and sufficient evidence to support the jury's verdict of guilty beyond a reasonable doubt" (Pet. App. A3).

1. Petitioner contends (Pet. 24-30) that his 1976-1977 submissions constituted "tax returns," either on the theory that they "contain[ed] sufficient information from which [his] tax liability [could] be calculated" or that they represented "an honest and genuine endeavor to satisfy the law," and that the jury should have been so instructed. This contention is frivolous. The courts of appeals have uniformly held that a Form 1040 containing no financial or tax-related information whatsoever is not a "tax return" and that a person who submits such a document can properly be convicted for willful failure to file. *E.g.*, *United States v. Verkuilen*, 690 F.2d 648, 654 (7th Cir. 1982); *United States v. Francisco*, 614 F.2d 617, 618 (8th Cir. 1980); *United States v. Edelson*, 604 F.2d 232, 234 (3d Cir. 1979). And there is no support for petitioner's assertion that documents of the sort he submitted can be rescued from nullity and transformed into "tax returns" if a taxpayer can

somehow show that they represent "honest and genuine endeavor[s]" to satisfy the law."¹ Even if this assertion were correct, there was absolutely no evidence that petitioner's actions were "honest" or "genuine" here. This Court has noted that "a self-incrimination claim against every question on the tax return * * * would be virtually frivolous." *Albertson v. SACB*, 382 U.S. 70, 78-79 (1965). In any event, the trial judge properly instructed the jury that willfulness is a voluntary and intentional violation of a known legal duty; in convicting petitioner, the jury plainly concluded that he had not made an "honest and genuine endeavor" to satisfy his filing obligation.

2. Petitioner contends (Pet. 30-35) that he made a valid claim of his Fifth Amendment privilege and that the trial judge should have so instructed the jury. Petitioner appears to acknowledge the well-established proposition that the Fifth Amendment privilege must be invoked selectively, in response to specific questions to which truthful answers would tend to incriminate; it does not license a wholesale refusal to fill out a tax form. *Marchetti v. United States*, 390 U.S. 39, 50 (1968); *Albertson*, 382 U.S. at 78-79. Petitioner's assertion (Pet. 33) that his Fifth Amendment claim was properly made "in response to specific questions" is a verbal quibble; a claim is not made "specifically" when asserted with respect to each of the 60 questions requesting financial information on a tax form.²

¹ Petitioner's reliance (Pet. 24-27) on *United States v. Moore*, 627 F.2d 830 (7th Cir. 1980), is misplaced. The Seventh Circuit there held that a taxpayer whose Form 1040 contained *some* tax-related information could nevertheless be prosecuted for willful failure to file if his actions did *not* constitute an honest and genuine endeavor to satisfy the law.

² Contrary to petitioner's contention (Pet. 37-38), *United States v. Sullivan*, 274 U.S. 259 (1927), does not stand for the proposition that "the right to make a valid claim of [Fifth Amendment] privilege is

3. Petitioner contends (Pet. 28-30, 42-49) that the trial judge erred in failing to instruct the jury that it should consider petitioner's filing of "amended" Forms 1040, as well as his prolific correspondence with the IRS, in determining whether his failure to file 1976-1977 tax returns was willful. The crime of willful failure to file a return, however, is complete once the due date passes; "the intent to report the income and pay the tax sometime in the future does not vitiate the willfulness required by" Section 7203. *Sansone v. United States*, 380 U.S. 343, 354 (1965). Since the jury was required to consider petitioner's good faith, or lack of it, at the times his 1976-1977 returns were due to be filed, his later efforts to comply with the law, if such they were, were immaterial. *E.g.*, *United States v. O'Connor*, 433 F.2d 752, 753 n.1 (1st Cir. 1970); *United States v. Greenlee*, 380 F. Supp. 652, 660 (E.D. Pa. 1974), *aff'd*, 517 F.2d 899, 903 (3d Cir.), *cert. denied*, 423 U.S. 985 (1975). And even if amended returns could be regarded as relevant in assessing the willfulness of a taxpayer's original failure to file, petitioner's amended documents were not "tax returns" any more than his original submissions were. They, like their predecessors, contained no tax-related information whatsoever and made a mere blanket assertion of the Fifth Amendment privilege.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

DECEMBER 1983

available even as to the amount of a taxpayer's income." This Court in *Sullivan* said (*id.* at 263-264) that "[i]t would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime."